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Supreme Court, U.S.
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No. 00-1130

IN THE

Supreme Court of the United States

MARC A. NEWMAN,

Petitioner,

v.

ECKERD CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

GREGORY J. HARE*
JOHN C. GLANCY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
600 Peachtree Street, N.E.
Suite 2100
Atlanta, Georgia 30308
(404) 881-1300

* *Counsel of Record*

Counsel for Respondent

165216

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Must the question of whether a plaintiff has made a *prima facie* showing of discrimination under the Age Discrimination in Employment Act (ADEA) always be decided by a jury, rather than by the district court upon a properly supported motion for summary judgment.

2. Whether an inference of unlawful age discrimination arises under the Age Discrimination in Employment Act (ADEA) when a plaintiff is demoted and replaced by someone his own age.

3. Whether granting a properly supported motion for summary judgment in favor of a defendant in an action arising under the Age Discrimination in Employment Act (ADEA) denies a plaintiff his Seventh Amendment right to a trial by jury.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Eckerd Corporation, is a wholly owned subsidiary of J.C. Penney Company, Inc. which is publicly traded.

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APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner set forth the provisions of the Seventh Amendment at page 2 of his Petition and attached the entire text of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* in the Appendix to the Petition. (App., pp. 23-57).[1] The following portions of the ADEA are particularly pertinent to the Court's analysis in this matter:

§ 623. Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

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1. References to documents included in the Appendix attached to Newman's Petition will be indicated parenthetically as "App." followed by the appropriate page number(s).

> It shall not be unlawful for an employer . . . —
>
> (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ;
>
> * * *
>
> (3) to discharge or otherwise discipline an individual for good cause.

29 U.S.C. § 623(a)(1), (f)(1), (f)(3).

STATEMENT OF THE CASE

Petitioner Marc A. Newman (Newman) was hired by Respondent Eckerd Corporation (Eckerd) in 1971. In 1995, Newman became the District Operations Manager (DOM) for Eckerd's Northeast Georgia District. Newman was one of ten DOMs in Eckerd's Mid-South Region, which covers parts of Georgia, Tennessee, Mississippi, and South Carolina. In July 1996, Doug Sheasley became the Vice President of the Mid-South Region, and as such became Newman's direct supervisor. Sheasley spent the second half of 1996 becoming familiar with his region's store operations and personnel, including Newman. (App., pp. 5-6).

In January 1997, Sheasley evaluated the performance of all DOMs in his region and thereafter met with Newman to discuss his evaluation of Newman's 1996 performance. Sheasley expressed concerns over the profitability of Newman's stores and counseled Newman concerning mismanagement of those stores, including his infrequent

visits to his stores, his non-compliance with company operating procedures, programs, and store standards, his failure to properly staff his stores and train his managers, and his lack of teamwork with other employees in the region. Newman was aware that Store Managers under his supervision had made similar complaints about him in 1996 and admitted that his district needed improvement in 1996. Sheasley documented Newman's deficiencies in a written performance evaluation, which rated Newman as a 3 out of 5 (with 5 being the lowest possible score). Sheasley expressly warned Newman that his performance in 1997 must improve or he would face receiving an unsatisfactory performance rating. (App., pp. 6-7).

Despite that counseling session, Newman's performance did not improve over the remainder of 1997. To the contrary, Sheasley received additional reports from regional staff members stating that Newman was not properly managing his stores. They reported that many stores were in poor condition, he still was not visiting his stores on a regular basis, and was not properly training and supervising Store Managers. Sheasley visited several of Newman's stores in early December 1997, including one that was in a state of crisis only two days before its scheduled grand opening. Based on these observations, Sheasley decided that Newman must be removed from his DOM position. In a December 1997 meeting, Sheasley told Newman that he had lost confidence in Newman's management abilities and stated that he would remove Newman from the DOM position. (App., pp. 7-8).

Shortly thereafter, Sheasley compiled performance evaluations for all ten DOMs in the region. Newman's 1997 performance ranked last among the group with an

unsatisfactory rating of 4 out of 5, which also made Newman ineligible for an annual bonus. Newman was 45 years old when Sheasley removed him from the DOM position. Sheasley was 43 years old at the time. (App., pp. 8-9).

Once Sheasley decided to remove Newman, he began searching for a suitable replacement. Sheasley decided to fill the Northeast Georgia vacancy by transferring Dennis Mack into the slot. Mack had been a DOM in Mississippi for the past several years, had previously worked as both a DOM and Store Manager in the Atlanta area, and had been the region's third highest ranked DOM for 1997, with a performance rating of 2 out of 5. Mack, who was 45 years old at the time (just like Newman) took over Newman's entire district and assumed *all* of Newman's previous duties. (App., pp. 8-9).[2]

After Sheasley decided to replace Newman with Mack, he searched for someone to fill Mack's vacancy in Mississippi. Ultimately, Sheasley selected Scott DeFriese, a Store Manager in Tennessee, who was 33 years old at the time. (App., p. 9). Eckerd then unsuccessfully attempted to locate another management-level position for Newman, but eventually re-assigned him to a Store Manager position in March 1998. (App., p. 10).

Newman filed a Complaint on July 1, 1998 in the United States District Court for the Northern District of Georgia alleging that Eckerd violated the ADEA by demoting him from DOM to Store Manager because of his age. Eckerd filed

2. In April 1998, Eckerd restructured the Mid-South Region. Consequently, some of Newman's former stores were transferred from Mack to Jeff Morgan, another DOM, who was also 45 years old at the time. (App., p. 9 n.8).

a well-supported Motion for Summary Judgment on March 8, 1999. On March 20, 2000, District Judge Clarence Cooper issued an Order granting Eckerd's Motion for Summary Judgment in its entirety, and dismissing Newman's Complaint with prejudice. The district court held that Newman failed to make a *prima facie* showing of discrimination because he failed to demonstrate either that he was replaced by someone significantly younger or that he was qualified for his position at the time of demotion. The district court also examined Newman's pretext argument and found it without merit. (App., pp. 14-22).

Newman filed his appeal on April 14, 2000. In a terse opinion dated October 18, 2000, the Eleventh Circuit agreed that Newman failed to make a *prima facie* showing of discrimination because he could not demonstrate that he was replaced by a substantially younger person. Having affirmed the district court's dismissal on that basis alone, the Eleventh Circuit did not advance its analysis to the other grounds relied on by the district court in granting summary judgment to Eckerd. (App., pp. 1-4).

REASONS FOR DENYING THE WRIT

Newman has set forth three "questions presented" in his Petition (Petition, p. i), but as shown below, those questions do not articulate any compelling reasons that would warrant this Court's exercise of its discretion to grant certiorari. Although Newman claims that the Eleventh Circuit's decision conflicts on various grounds with decisions issued by other circuit courts, the alleged conflicts arise only on account of Newman's misinterpretation and misconstruction of those other decisions. In reality, Newman's Petition seeks review primarily based on his disagreement with the district court's

factual findings, which the court of appeals affirmed on review. In addition, Newman seeks review by advancing ill-conceived legal arguments that disregard well-settled principles of law. In short, Newman's request seeks new review of specific factual questions having no unique significance beyond the present case, which does not present a proper basis warranting review on certiorari. The writ therefore should be denied.

I. IN ALL FEDERAL CIRCUITS, COURTS PROPERLY GRANT SUMMARY JUDGMENT WHEN A PLAINTIFF FAILS TO PROFFER EVIDENCE SUPPORTING EACH ELEMENT OF HIS *PRIMA FACIE* CASE

Newman asserts that the Eleventh Circuit's decision in this case somehow conflicts with the First Circuit's holding in *Keisling v. Ser-Jobs For Progress, Inc.*, 19 F.3d 755 (1st Cir. 1994). Newman claims that the First Circuit "clearly" held that "the decision as to whether a *prima facie* case has been established by a Plaintiff in an Age Discrimination case is one for the jury." (Petition, p. 8) (citing *Keisling*, 19 F.3d at 760). Newman therefore asserts that the Eleventh Circuit erroneously allowed the district court to grant summary judgment to Eckerd based on Newman's failure to make a *prima facie* showing of discrimination. (*Id.*). Newman's argument simply ignores well-established law on this point and miscasts the holding of the First Circuit.

This Court decided many years ago that Federal Rule of Civil Procedure 56(c) "*mandates* the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of *an element essential*

to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added). Moreover, when an employment discrimination plaintiff fails to present direct evidence of discrimination, and thus relies on circumstantial proof, the plaintiff bears the "initial burden . . . of establishing a *prima facie* case" of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This Court since has clarified that in cases of alleged age discrimination, where the plaintiff points to the characteristics of his replacement as evidence supporting his *prima facie* showing of discrimination, the plaintiff must demonstrate the he was replaced by someone *significantly younger*. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (emphasis added).

Based on this Court's rulings, the Eleventh Circuit has established that

> [i]n an ADEA case involving discharge, demotion, or failure to hire, a plaintiff may establish a *prima facie* case by showing: (1) that he was a member of the protected [age] group . . . ; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position . . . ; and (4) that he was qualified to do the job. . . .

Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir.) (citing *O'Connor*, 517 U.S. at 311-12), *cert. denied*, 525 U.S. 962 (1998). The Eleventh Circuit also noted in *Turlington* that "summary judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a *prima facie* case," which conforms to the standards articulated by this Court in *Celotex* and its progeny.

Id. at 1433. Consequently, the question of whether Newman could demonstrate that he was replaced by someone significantly younger, and thus whether he could establish a *prima facie* case, was properly decided by the district court and affirmed by the Eleventh Circuit, without needing to impanel a jury. Indeed, the very essence of Rule 56 was well-served in this case when the district court granted summary judgment based on Petitioner's inability to proffer evidence supporting an essential element of his case.

Newman's reliance upon *Keisling* is misplaced, for that case does not support the broad proposition that the determination of whether a plaintiff has made a *prima facie* showing of age discrimination always rests in the sole province of the jury. Unlike the instant case, Keisling's age discrimination claim was actually tried before a jury, which rendered a plaintiff's verdict. 19 F.3d at 757. The defendants then appealed on several grounds, including the denial of their post-trial motion for judgment as a matter of law. *Id.* at 758. Consequently, one of the questions under review was whether the evidence presented at trial pointed "so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." *Id.* at 759-60. The language quoted by Newman in his Petition simply refers to the defendant's failure, *in that particular case*, to present overwhelming evidence of the jury's error.

While the plaintiff in *Keisling* certainly presented adequate evidence supporting her *prima facie* case (and indeed, supporting the jury's verdict), the First Circuit and district courts thereunder nevertheless regularly grant summary judgment in favor of employers when plaintiffs fail to make a *prima facie* showing of

discrimination. *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000); *Seda Soto v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 73 F. Supp. 2d 116, 127-28 (D.P.R. 1999). Thus, there is no real conflict between the Eleventh Circuit's decision in this case and decisions rendered in the First Circuit or any other circuit court.

Newman also argues at length in his Petition, both in this section and others, that the courts below made improper factual determinations when concluding that he failed to establish a *prima facie* case. (Petition, pp. 10-13). Specifically, with regard to whether he was replaced by someone significantly younger, Newman argues, contrary to the findings by the courts below, that he was replaced by the 33-year-old DeFriese, and not the 45-year-old Mack. The legal basis, or lack thereof, for this argument is discussed in more detail below in Section II. However, it is important to note several factual misstatements in Newman's Petition, assertions that were specifically rejected by the courts below.[3]

Newman falsely asserts that "DeFriese was promoted to the DOM position in the Mid-South Region on the very same day that Newman was told he was being removed from the DOM position. . . ." (Petition, p. 11). Newman did not present any record evidence in the courts below to support this misleading assertion. Rather, the undisputed facts showed that Sheasley told Newman, in early December, that he would be removed from the DOM position. (App., p. 8). Thereafter, Sheasley decided to move Mack into Newman's vacant position. It was only then that Sheasley back-filled Mack's vacancy in Mississippi by selecting DeFriese. (App., p. 9).

3. Eckerd discusses these factual issues in light of Supreme Court Rule 15.2.

There is no record evidence indicating that Sheasley made the decisions to demote Newman, transfer Mack, and promote DeFriese concurrently, let alone "on the very same day," as Newman alleges. (Petition, p. 11).

Newman also notes that "within less than two months after his demotion, Eckerd reorganized the Mid-South Region, including reassignment of approximately half of [Newman's] former stores" away from Mack. (Petition, p. 12). Newman then hastily deduces that "no single person" actually replaced him. Newman's copious non-disclosure of remaining salient details was clearly purposeful, for full disclosure further highlights the absence of age discrimination by Eckerd. Indeed, all of Newman's former stores that were later transferred away from the 45-year-old Mack then were re-assigned to the 45-year-old Morgan, another existing DOM. (App., p. 9 n.8). Newman's non-disclosure of these record facts is not surprising given this Court's holding in *O'Connor*, a case which Newman does not even attempt to address in his Petition.

Finally, Eckerd notes that under Supreme Court Rule 10, this Court rarely grants a writ of certiorari "when the asserted error consists of erroneous factual findings." This Court has traditionally accorded great weight to factual findings made by a district court and approved by a court of appeals. *See, e.g., National Collegiate Athletic Assn. v. Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984). In fact, it is the "settled practice" of this Court to accept factual findings on which both the district court and the court of appeals have concurred, even if they are claimed to be clearly erroneous, except in the "most exceptional circumstances." *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *accord Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299 (1985). The Court, as

"[a] court of law . . . rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *accord Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996).

Both courts below viewed all of the evidence presented by the parties, made all reasonable inferences therefrom in a light most favorable to Newman, and made the proper factual findings. Newman now asks this Court to grant certiorari to review the facts for a third time. However, Newman has not demonstrated any "obvious and exceptional showing of error" or "exceptional circumstances" to warrant such a request, and thus certiorari should be denied on this ground, as well as the others described herein.[4]

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4. Newman also argues that the district court rejected his *prima facie* showing by finding erroneously that he was "no longer capable of performing his position" at the time of his demotion. (Petition, pp. 9-11 & n.1). Eckerd acknowledges that the Eleventh Circuit has traditionally held that when looking at the *prima facie* element of qualification, the courts should focus "on [a] plaintiff's skills and background to determine if they were qualified for a particular position." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1227 (11th Cir. 1993). Consequently, the Eleventh Circuit views a plaintiff's performance problems as "more appropriately raised as part of the second and third steps of the *McDonnell Douglas* scheme." *Id.* However, the Eleventh Circuit also stated that these instructions "should not be read to hold that evidence of performance is *never* relevant at the *prima facie* stage." *Id.* (emphasis added). In any event, the Eleventh Circuit in the instant case limited its review of the district court's order to the issue of whether Newman was replaced by someone significantly younger. Accordingly, Eckerd will not address the issue of Newman's performance as it relates to his *prima*

(Cont'd)

II. UNDER *O'CONNOR*, A DEMOTED ADEA PLAINTIFF PROCEEDING UNDER THE *MCDONNELL DOUGLAS* PROOF SCHEME MUST SHOW REPLACEMENT BY SOMEONE SIGNIFICANTLY YOUNGER

As this Court succinctly explained in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), a plaintiff proceeding under the *McDonnell Douglas* burden-shifting proof scheme must first establish a *prima facie* case by proffering "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *Id.* at 312 (emphasis removed) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). In an ADEA case, an inference of unlawful age discrimination "cannot be drawn from the replacement of one worker with another worker *insignificantly* younger." *Id.* at 313 (emphasis added). The decisions of the Eleventh

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(Cont'd)

facie showing of discrimination, but will instead limit its analysis to the replacement issue on which the Eleventh Circuit predicated its opinion. Eckerd notes, however, that Newman's factual assertions related to his performance are speculative, self-laudatory, and solely aimed at his own perception of his performance, and not at Sheasley's perception. Of course, Newman's subjective opinion of his own performance is not probative of whether Sheasley had a good-faith belief that Newman's performance was unacceptable when he decided to demote Newman, and does not create an issue of material fact. *See, e.g.*, *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) ("our inquiry is limited to whether the employer gave an honest explanation for its behavior.") (citations omitted); *Tidwell v. Carter Products*, 135 F.3d 1422, 1426-27 (11th Cir. 1998) (plaintiff cannot survive dispositive motion merely by "questioning the wisdom of the employer's reason" for its actions) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997)).

Circuit concur and require replacement by a substantially younger person as an essential element of the plaintiff's *prima facie* case. *See, e.g., Turlington*, 135 F.3d at 1432; *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1390 (11th Cir.) (plaintiff failed to establish a *prima facie* case where his replacement was only 2 years younger), *cert. denied*, 464 U.S. 1018 (1983).

Contrary to Newman's assertions, the decisions of the Seventh Circuit also concur. *See, e.g., Fairchild v. Forma Sci., Inc.*, 147 F.3d 567, 571 (7th Cir. 1998) (a *prima facie* case requires showing that substantially younger, similarly situated people were treated more favorably than plaintiff); *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 892 (7th Cir. 1997) (finding age gap insignificant when comparators were 6-7 years younger than plaintiff, and deeming 10 years a "reasonable threshold" for establishing "significant" or "substantial" age gap); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1332-33 (7th Cir. 1995) (plaintiff salesman unable to demonstrate *prima facie* case absent evidence he was replaced by or treated less favorably than younger employees).

Given the unambiguous mandate of *O'Connor*, perhaps it is not surprising that Newman's Petition does not cite or analyze this Court's leading guidance on this topic — after all, application of *O'Connor* is fatal to Newman's claims. The undisputed facts show that Newman was replaced by Mack, who assumed *all* of his duties for more than two months, and thereafter a portion of Newman's former stores were allocated to Morgan. It is also undisputed that Newman, Mack, and Morgan were all 45 years old at the time. Presumably recognizing that these simple facts clearly refuted any suggestion that Sheasley's personnel decisions

were motivated by age, Newman attempted below to advance the novel, yet untenable argument that he was not actually replaced by Mack, but instead was replaced by Mack's replacement in Mississippi, DeFriese, who was 33 years old. The district court properly found that there was "no evidence to suggest that DeFriese assumed *any* of Newman's job responsibilities in the Northeast Georgia District." (App., p. 15 & n.9) (emphasis added). The court of appeals properly affirmed this holding, stating that Newman "failed to present evidence to show that DeFriese, in his new capacity, performed at least some of Newman's former duties." (App., p. 3). Both courts below relied upon established Eleventh Circuit precedent providing that "[w]here the employee's position is clearly delineated and responsibilities are well defined, the court should focus on the person that physically replaced the employee." (App., pp. 3, 15) (quoting *Hawkins v. Ceco Corp.*, 883 F.2d 977, 982 (11th Cir. 1989), *cert. denied*, 495 U.S. 935 (1990)).

Newman now asserts that the holdings of the courts below conflict with the Seventh Circuit's decision in *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999). In *Miller*, the plaintiff was a 57 year old sales person with accounts in a territory spanning several states. *Id.* at 310-11. In the early 1990's, Borden terminated Miller and reassigned his accounts, which were worth approximately $1,000,000, to three salespeople in their 40's. *Id.* Miller sued, alleging that his termination was based on age. *Id.* at 311. The district court granted Borden's motion for summary judgment, holding that he failed to make a *prima facie* showing of discrimination because he could not show that younger employees were treated more favorably.

On appeal, the Seventh Circuit reversed, stating that in situations where an employee is terminated and his duties are variously distributed among existing employees, "the inference of discrimination . . . is premised on some degree of fungibility between the terminated employee's job and the younger employee's job." *Id.* at 313.[5] More specifically, the Seventh Circuit held that in a "fungibility" situation, "to establish a *prima facie* case of discrimination Miller need show only that he was treated less favorably than the substantially younger employees *who absorbed his accounts* . . . and that these employees were similarly situated to himself." *Id.* (emphasis added).

Newman correctly avers that *Miller* is factually similar to the instant case. (Petition, p. 13). In both cases, a person was removed and his job duties were distributed to existing employees, but Newman ignores a critical difference — *i.e.*, in this case, unlike *Miller*, the individuals who assumed Newman's job duties were *not substantially younger*. Consequently, while Miller was able to make a *prima facie* showing of age discrimination, Newman cannot.

In a strained attempt at logic, Newman appears to argue that the ten DOMs in Eckerd's Mid-South Region were somehow identical and interchangeable (*i.e.*, "fungible"). Indeed, Newman suggests that the DOM position is "essentially the same throughout the country." (Petition, p. 14). However, the only evidence Newman offers for this proposition is his own self-serving and speculative jangle

5. The Seventh Circuit did not explain exactly what it meant by using the term "fungibility." Eckerd notes, however, that Black's Law Dictionary defines "fungibles" as "goods which are identical with others of the same nature, such as grain and oil." Black's Law Dictionary 675 (6th Ed. 1990).

that "a DOM is a DOM is a DOM." (Petition, pp. 10-12). Although Newman has never provided *any* evidence to support this unexplained theory, he perhaps asserts that every DOM nationwide manages the same number of stores in identical markets with the same number and quality of employees operating under the exact same working and economic conditions. No such evidence exists in the record.

Despite Newman's repetitive mantra that "a DOM is a DOM is a DOM," the fact remains that Eckerd's DOMs are not "fungible" in any sense of the word. They are not workers on an assembly line performing the same exact rote functions, nor are they like interchangeable office clerks who spend their days mundanely filing records. (*See* Petition, pp. 14-15). Rather, they are supervisory personnel who require a high level of knowledge, training, and experience to effectively manage entirely different sets of personnel and working conditions in the numerous stores throughout their individual districts. As such, the courts below correctly examined the individual(s) who actually assumed Newman's duties, just as the Seventh Circuit did in *Miller*. (App., pp. 3, 15).

The Eleventh Circuit clearly explained this concept in *Hawkins v. Ceco Corp.*, 883 F.2d 977, 982 (11th Cir. 1989), *cert. denied*, 495 U.S. 935 (1990), which Newman continues to ignore. As the *Hawkins* court explained, "an employee's position and responsibilities are relevant to determining his or her replacement. Where the employee's position is clearly delineated and responsibilities are well defined, the court should focus on the person that *physically replaced* the employee . . . " to determine whether an inference of discrimination arises. *Id.* (emphasis added). In contrast, "[w]here the employee's position requires general labor and

little skills or training, it is appropriate to determine who filled the vacancy created by the plaintiff's discharge or who was the next person hired at that skill level." *Id.* at 983.

As shown above, there is no compelling reason for this Court to revisit the "age of replacement" issue by granting the writ in this case. This Court provided adequate guiding principles in *O'Connor*, and contrary to Newman's assertions, there is no conflict between the Eleventh and Seventh Circuits. Rather, *Hawkins* and *Miller* show that the circuits are in accord, because in both cases the courts looked to the persons who actually assumed the departed employee's job duties. This is not an area where the lower courts need additional guidance from this Court. Accordingly, certiorari is not appropriate, and Newman's writ should be denied.

III. SUMMARY DISPOSITION OF NON-MERITORIOUS ADEA CASES UNDER FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT VIOLATE THE SEVENTH AMENDMENT'S RIGHT TO A JURY TRIAL

While Newman claims that the courts below impermissibly infringed upon his right to a jury trial (Petition, pp. 15-21), federal courts have long recognized that dismissal of a case upon a motion for summary judgment does not violate the Seventh Amendment because a properly granted dispositive motion establishes that there is no triable issue to be submitted to a jury. *See In Re TMI Litigation*, 193 F.3d 613, 725 (3d Cir. 1999) (no Seventh Amendment violation "so long as the person having the right to the jury trial is an actual participant in the summary judgment proceeding") (citing *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-20 (1902)), *cert. denied*, 120 S. Ct. 2238

(2000); *see also Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980) ("Summary judgment is authorized where there are no issues of material fact in dispute. In such circumstances the jury, as trier of fact, has no role, and appellant's seventh amendment rights are not infringed."); *Oglesby v. Terminal Transport Co.*, 543 F.2d 1111, 1112-13 (5th Cir. 1976) ("No constitutional right to a trial exists when after notice and a reasonable opportunity a party fails to make the rule-required demonstration that some dispute of material fact exists which a trial could resolve.").[6]

Newman argues that further instruction from this Court is desperately needed to ensure proper application of Rule 56, because "there are no objective or reasonable standards for the grant of Summary Judgment guiding Courts in the decisions on Rule 56 Motions in the Eleventh Circuit." (Petition, p. 16). However, it is apparent that Newman's frustration over his inability to get this case before a jury has clouded his sense of perspective. Indeed, he avers that "*all* the decisions in the Eleventh Circuit on Summary Judgment issues are arbitrary and capricious exercises" and that the courts thereunder have consciously engaged in a concerted "course of action" by abusing their judicial authority "to usurp fact-finding authority from juries." (Petition, p. 19). Newman proffered no empirical data or other reliable support for his audacious attack against the integrity of the Eleventh Circuit's federal judiciary, and surely there exists no legitimate basis for impugning the reputation of such judges.

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6. Although Newman characterized this portion of his Petition as implicating his constitutional rights, in actuality, Newman devoted the bulk of his argument in this section to again rehashing the factual determinations that he would like this Court to re-review. As Eckerd discussed above, no such review is warranted.

Newman's sense of frustration surfaced again when he criticized the federal courts for bypassing the opportunity "to view the demeanor of the witnesses," "judge [their] credibility," and weigh their potential "biases" when deciding motions for summary judgment. (Petition, p. 20). Newman ultimately characterized Rule 56 proceedings as an inefficient waste of time, resources, and money that should be enjoined. (Petition, p. 21 & n.5).

Newman's conspiracy theories and unsupported attacks against the abilities and motivations of federal judges certainly highlight his misunderstanding of Rule 56 motion procedure and its purpose. As this Court has explained, summary judgment is *not* "a disfavored procedural shortcut, but rather [is] an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

Based on the totality of Newman's argument, he apparently would have this Court carve out a special plaintiff-friendly exception to Rule 56 in employment discrimination cases. While it is true that resolution of employment discrimination cases often turns on a unique evaluation of an employer's motivations and intent, this Court has unambiguously stated that "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993). Indeed, this Court recently rejected a rule which would have made it easier for job discrimination plaintiffs to get their cases to a jury, explaining that "to hold otherwise would be effectively to insulate an entire category of employment discrimination

cases from review under Rule 50 [or Rule 56], and we have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, __, 120 S. Ct. 2097, 2109 (2000) (internal quotation and citation omitted); *see also Chapman v. AI Transport*, 229 F.3d 1012, 1026 (11th Cir. 2000) ("The long and short of it is that the summary judgment rule applies in job discrimination cases just as in other cases.").

In their opinions granting Eckerd's Motion for Summary Judgment, both courts below correctly interpreted and applied Rule 56, and properly determined that Newman could not establish the essential elements of his age discrimination claim. It was factually and legally clear that Newman was not replaced by someone substantially younger, nor was there any other evidence creating an inference of age discrimination. Accordingly, Newman's Seventh Amendment rights were not violated and certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, Newman's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GREGORY J. HARE*
JOHN C. GLANCY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
600 Peachtree Street, N.E.
Suite 2100
Atlanta, Georgia 30308
(404) 881-1300

Counsel for Respondent

* *Counsel of Record*